Supreme Court, U.S.
FILED
DEC 24 1996
CLERK

No. 96-817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. TILTON,

Petitioner,

—v.—

CAPITAL CITIES/ABC, INC., AMERICAN BROADCASTING COMPANIES, INC., ABC NEWS, INC., DIANE SAWYER, ROBBIE GORDON and KELLY SUTHERLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in granting summary judgment in favor of defendant journalists and against a public figure plaintiff where the plaintiff failed to present evidence sufficient to raise a genuine issue of material fact as to whether defendants broadcast false statements and/or whether defendants broadcast the statements with actual malice.

2. Where all of plaintiff's underlying libel and false light invasion of privacy claims were properly dismissed, whether the district court erred in applying the rule of Oklahoma law that equity will not enjoin a libel to dismiss plaintiff's claim for an injunction against false speech.

LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties to the appeal in the United States Court of Appeals for the Tenth Circuit that is the subject of the petition appear in the caption of this case.

Pursuant to Rule 29.6, the corporate respondents state as follows:

On September 19, 1996, respondent Capital Cities/ABC, Inc. was renamed ABC, Inc. ABC, Inc. is a wholly-owned subsidiary of Disney Enterprises, Inc., which is itself a wholly-owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC, Inc. has no nonwholly-owned subsidiaries except the following (all of which are nonwholly-owned indirect subsidiaries of ABC, Inc.): DSC Videos, Inc.; ESPN, Inc.; New York Farm Show, Inc.; Worldwide Television News Corporation; ABC/EA Home Software, Inc.; and ABC Radio Partners International Limited.

Respondent ABC News, Inc. is a wholly-owned subsidiary of ABC News Holding Company Inc., which is itself a wholly-owned subsidiary of ABC Holding Company Inc., which is itself a wholly-owned subsidiary of ABC, Inc. ABC News, Inc. has no nonwholly-owned subsidiaries.

Respondent American Broadcasting Companies, Inc. is a wholly-owned subsidiary of ABC Holding Company Inc., which is itself a wholly-owned subsidiary of ABC, Inc. American Broadcasting Companies Inc. has no nonwholly-owned subsidiaries.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 27, 1996 should not issue because petitioner presents no question worthy of the exercise of this Court's *certiorari* jurisdiction and because the decision below is in all respects correct.

STATEMENT OF THE CASE

Statement of Facts

Through the 1980s and into the 1990s, petitioner Robert G. Tilton ("Tilton") became one of the most popular and

successful televangelists in the country. Both his daily television program and his weekly Sunday service were broadcast to a nationwide audience. In overwhelming numbers, viewers (often of limited means and in dire financial straits) responded by sending Tilton their prayers, their pledges and their contributions.

Notwithstanding his prominence and the media scrutiny accorded some other televangelists, Tilton and his ministry prospered without attracting much attention by the national press and media. In late 1990, however, respondent Diane Sawyer, the co-anchor and correspondent of respondent American Broadcasting Companies, Inc.'s ("ABC") television news program *PrimeTime Live* ("*PrimeTime*"), viewed some of Tilton's television broadcasts, was particularly struck by his repeated requests for money and began to consider Tilton as a possible subject for a news report.

Beginning in the spring of 1991, Sawyer and other investigative journalists working for *PrimeTime*, including respondents Robbie Gordon and Kelly Sutherland, began an extensive investigation of Tilton and a number of other prominent American televangelists. During that investigation, the ABC journalists contacted more than 200 potential sources. They interviewed, in the United States and abroad, present and former members and employees of Tilton's church, government officials, former friends of Tilton, business associates of Tilton, foreign missionaries and government officials, other journalists who had investigated Tilton and experts on televangelism. Tilton himself refused to be interviewed for the report.

In the course of the research, the ABC journalists met and received the assistance of a Dallas minister, Ole Anthony. Accompanied by Anthony, the journalists conducted a hidden camera interview at a direct mail company that did work for Tilton. The ABC journalists also attended services conducted by Tilton and obtained church mailings by placing their names on his mailing list.

During their investigation, the journalists learned that mail sent to Tilton in Dallas by his followers (usually containing contributions and prayer requests for Tilton's personal attention) in fact was immediately forwarded unopened to a bank in Tulsa, where all the money was removed. Subsequently, Mr. Anthony and his associates made three visits to the bank and another company in Tulsa that was part of Tilton's mail processing operation to inspect the trash at these sites. Anthony reported finding thousands of items that Tilton's followers had sent to him in Dallas to pray over but had ended up in the trash in Tulsa instead. The ABC journalists inspected what Anthony had found, confirming for themselves that the items had been "trashed."

ABC's months of investigation culminated in an hour-long report split into three segments which aired on November 21, 1991. One segment of the report was devoted to Tilton and his church. The segment revealed the sophisticated operation by which Tilton assured that contributions from followers were carefully processed and banked. The report contrasted the quite different treatment accorded the prayer requests sent to Tilton—including the fact that prayer requests had been found in the trash.

The report also revealed, for the first time to a national audience, Tilton's own lavish lifestyle—including his multi-million dollar homes, his generous salary, his $132,000 boat. The report also examined (to the extent it could be discovered without Tilton's cooperation), Tilton's background and the circumstances surrounding his rise to prominence as a televangelist.

ABC continued its investigation of Tilton after the broadcast. On July 9, 1992, the original program was rebroadcast, with certain minor changes, together with a follow-up report.

The Proceedings Below

In November of 1992, Tilton instituted this libel action in the United States District Court for the Northern District of Oklahoma.

In May of 1993, Tilton moved before the district court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting certain statements contained in the *PrimeTime* broadcasts. After a five-day evidentiary hearing, the district court denied Tilton's motion, finding, *inter alia*, that he had failed to "demonstrate[ ] that there [was] a substantial likelihood of recovery on the merits regarding the three claimed libels" because Tilton's evidence did not prove falsity or actual malice by clear and convincing evidence as required by this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. *Tilton* v. *Capital Cities/ABC, Inc.*, 827 F. Supp. 674, 681 (N.D. Okla. 1993).

After the close of discovery which included the taking of more than 70 days of depositions and the exchange of literally hundreds of thousands of documents, on March 28, 1995 respondents filed motions for summary judgment. Shortly after respondents filed their motions for summary judgment, Tilton filed his own motion claiming that there were no material issues of fact in dispute as to six core passages of the broadcasts and that he was entitled to summary judgment as to them.

On June 19, 1995, the district court issued its ruling granting summary judgment to the respondents. *Tilton* v. *Capital Cities/ABC, Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995) (Pet. App. at A4-A65).[1] In its exhaustive opinion, the district court examined the statements challenged by Tilton, painstakingly reviewed the submissions of the parties and properly applied the standards established by this Court for evaluating summary judgment motions in public figure libel cases. Judgment in favor of the respondents was entered. (Pet. App. at A2-A3)

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[1] References herein to "Pet. at ___" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. at ___" are to the Appendix annexed thereto.

Tilton appealed to the United States Court of Appeals for the Tenth Circuit. The court of appeals heard oral argument on May 14, 1996. On August 27, 1996, the court of appeals affirmed the judgment of the district court in an opinion adopting the district court's analysis. *Tilton* v. *Capital Cities/ ABC, Inc.*, 95 F.3d 32 (10th Cir. 1996) (Pet. App. at A66-A68). On October 7, 1996, the court of appeals denied Tilton's petition for rehearing and suggestion for rehearing in banc, no member of the court having requested that a vote on rehearing be taken. (Pet. App. at A69-A70)

SUMMARY OF ARGUMENT

In this action, the public figure petitioner asserted a libel claim against respondent journalists. Under well-established and repeatedly reaffirmed precedent of this Court, petitioner bore the burden of proving that the statements he challenged as libelous were false and of proving, by clear and convincing evidence, that respondents made the statements with actual malice.

After extensive discovery, both petitioner and respondents filed summary judgment motions. The district court carefully reviewed the record and properly applied Fed. R. Civ. P. 56 and the precedents of this Court. The district court rightly found that there existed no genuine issue of material fact to be tried and that petitioner could not satisfy his burden of proving falsity and/or actual malice. Accordingly, the court granted respondents' summary judgment motion. Applying Oklahoma law, the court also dismissed petitioner's claim for an injunction.

In his petition, Tilton merely contends that the district court should not have granted respondents' summary judgment motion. Yet Tilton fails to demonstrate any error by the district court and fails to identify any genuine issue of material fact that he contends should have been tried. In any event, the petition identifies no conflict with any decision of this Court or with any ruling of any court of another circuit and sets

forth no important question of federal law that should be decided by this Court. *See* Supreme Court Rule 10. Simply put, the petition presents no justification for exercise of this Court's *certiorari* jurisdiction.

REASONS FOR DENYING THE WRIT

I.

TILTON WAS NOT DEPRIVED OF HIS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT TO BE TRIED AND SUMMARY JUDGMENT WAS THEREFORE PROPER

Tilton's first argument attempting to justify issuance of a writ of *certiorari* is that the district court's grant of summary judgment denied him his right to a jury trial under the Seventh Amendment to the United States Constitution. (Pet. at 6-13) As to this argument, as is also true with *all* others asserted in his petition, he cites no contrary ruling from any other court of appeals. Nor does he begin to demonstrate why this Court should review a ruling that is, at one and the same time, so fact-bound and so plainly correct.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

See generally Celotex Corp. v. *Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-88 (1986).

Tilton cannot seriously contend that Fed. R. Civ. P. 56 is unconstitutional under the Seventh Amendment. This Court has upheld the propriety of summary judgment procedures as not violative of Seventh Amendment jury trial rights. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968); *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 320 (1902); *cf. Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 336 (1979) ("many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment," citing summary judgment as an example); *Galloway* v. *United States*, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."); *In re Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined."). Moreover, the Court has explicitly recognized the important role of summary judgment in protecting the rights of defendants to have baseless claims dismissed before a jury trial. *See Celotex*, 477 U.S. at 327.

The crux of Tilton's petition is instead the more routine argument that the district court misapplied Rule 56 in granting respondents summary judgment. But as the district court's opinion makes clear (and the court of appeals tacitly recognized by adopting and affirming the district court's opinion (95 F.3d at 33, Pet. App. at A67)), the district court carefully and properly applied Fed. R. Civ. P. 56 and the mandate established by this Court in *Anderson*, 477 U.S. 242, and *Celotex*, 477 U.S. 317. In any event, petitioner's challenge to the application of well-settled law to the facts of this case is hardly a basis for the issuance of a writ of *certiorari*. *See* Supreme Court Rule 10 ("A petition for a writ of *certiorari* is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

As required by *Celotex*, respondents

> "[bore] the initial responsibility of informing the district court of the basis for [their] motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which [they] believe[ ] demonstrate the absence of a genuine issue of material fact."

477 U.S. at 323. Respondents' motion was supported by detailed affidavits from each of the journalists principally responsible for the reports, transcripts of testimony (including the deposition and preliminary injunction hearing testimony of Tilton) and interrogatory answers of Tilton. Respondents' motion urged that based upon the undisputed material facts, no reasonable jury could conclude that the statements challenged by Tilton were false, *see Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 776-78 (1986); *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), and/or that the respondents broadcast the reports knowing that they were false or with reckless disregard of truth or falsity, *see New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).[2]

As the party opposing respondents' motion, Tilton was required to "come forward with 'specific facts showing that there is a *genuine issue for trial*.' " *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis in *Matsushita*). Here, Tilton himself moved for partial summary judgment with respect to six of the statements at issue, arguing that there was no genuine issue as to any material facts with respect to those statements.

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[2] Tilton was admittedly a public figure (Pet. App. at 81, 303), and accordingly does not dispute that under the precedents of this Court and of the Tenth Circuit, in order to prevail on his libel and false light claims he bore the burden of proving falsity and of proving actual malice by clear and convincing evidence.

As this Court instructed in *Celotex*:

> "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex, 477 U.S. at 322. Additionally, as the district court recognized (905 F. Supp. at 1520, Pet. App. at A8), under this Court's decision in *Anderson*, the court was required to consider Tilton's showing in light of the heavy burden placed on him by *New York Times* v. *Sullivan*, and its progeny. That is, because Tilton, as an admitted public figure, bore the burden of proving actual malice by clear and convincing evidence:

> "The appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

Anderson, 477 U.S. at 255-56.

The district court carefully considered the showings made by respondents and by Tilton. With respect to each of the statements at issue, the district court found either (1) that Tilton had come forward with no evidence upon which a reasonable jury could find the statement to be false or (2) that Tilton had come forward with no evidence upon which a reasonable jury could find, by clear and convincing evidence, that respondents made the statement with actual malice.

The district court properly applied the summary judgment standard of Rule 56, consistent with this Court's decisions in *Anderson* and *Celotex*, which are cited and discussed in the court's opinion. (905 F. Supp. at 1520, Pet. App. at A8)

Even now, in his petition for *certiorari*, Tilton remains unable to make the required "showing sufficient to establish the existence of an element essential to" his claims, that is,

falsity and/or actual malice. *See Celotex*, 477 U.S. at 322. Instead, Tilton argues, without citation, that the district court made credibility determinations, weighed the evidence, and made inferences, all against him. (Pet. at 8) He asserts that the district court "weighed the clearly disputed facts before it and unconstitutionally resolved them in favor of the moving party Defendants." (Pet. at 8)

Yet, notwithstanding this broad attack on the district court's analysis, Tilton fails to identify a single credibility determination or factual inference made against him by the district court. Nor can he, because the district court made none. Indeed, the district court explicitly recognized its obligation to draw all reasonable inferences from the record in Tilton's favor. (905 F. Supp. at 1519, Pet. App. at A8) Where respondents' credibility was put at issue by Tilton, the district court was careful not to make credibility determinations. *See, e.g.*, 905 F. Supp. at 1539, Pet. App. at A54 ("Even if [respondent] Ms. Sutherland's credibility were at issue and her testimony were discredited, Plaintiff has also not submitted affirmative evidence to satisfy his burden of proof in regard to the issue of actual malice."); 905 F. Supp. at 1536-37, Pet. App. at A48 ("even if [respondent] Ms. Gordon's testimony were discredited, Plaintiff has failed to present any affirmative evidence to show Defendants knew their statement . . . was false"). Tilton's petition fails to identify any "genuine issue as to any material fact" relevant to the bases upon which the district court dismissed Tilton's claims.

Tilton's petition makes only two attempts to specify any error by the courts below with respect to the grant of summary judgment. First, Tilton repeats the constant refrain he has made throughout this case—his contention that respondents stole prayer requests and planted them in the trash. Tilton again relies upon this allegation to support his claim of actual malice. (Pet. at 8)

Incredibly, Tilton asserts in his petition, without any citation at all to the record, that "[t]he undisputed facts conclusively establish that Defendants planted the prayer requests in

the bank dumpster in order to frame Pastor Tilton and to create a story to make money." (Pet. at 8) In fact, the record is devoid of any evidence whatsoever to support Tilton's wild theory. At oral argument of the motions for summary judgment, the district court directly challenged Tilton's counsel to state what, if any, evidence there was to support the oft-repeated claim of stolen prayer requests. Tilton's counsel was unable to identify any such evidence. In its decision, the district court correctly found:

> "Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters." (905 F. Supp. at 1530-31, Pet. App. at A33)

In his appeal to the Tenth Circuit, Tilton was again unable to identify any factual basis whatsoever for his claim. (Pet. App. at A287-A293) Once again, in his petition to this Court, Tilton repeats his outrageous accusation, but is unable to cite even a scintilla of evidentiary support for the claim. In considering the sufficiency of Tilton's showing under Rule 56, the district court was not required to accept Tilton's implausible and utterly unsubstantiated allegation. *See Anderson*, 477 U.S. at 249 & 251; *Celotex*, 477 U.S. at 324; *Cities Service*, 391 U.S. at 288-90; Fed. R. Civ. P. 56(e).

Second, Tilton contends that the district court erred in dismissing his claims challenging *PrimeTime*'s report concerning Tilton's use of various items in his direct mail operation. Specifically, *PrimeTime* reported:

> "SAWYER: [voiceover] Tilton sends out an avalanche of things he asks viewers to send back to him—'miracle prayer cloths' he promises to touch and place upon an altar, cards he says he'll place upon a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing—place your hand there and he'll put his hand

> there too. There's holy water from the River Jordan, 'miracle anointing oil'—though Moore said some of these items come from that holy place, Taiwan.
>
> MOORE: 'We get stuff from Taiwan.' " (905 F. Supp. at 1523, Pet. App. at A16)

Tilton's principal claim with respect to this passage is that it accused him of committing mail fraud by sending viewers water from Taiwan and claiming it was from the River Jordan. (Pet. at 11-12) In dismissing Tilton's claim, the district court first noted that the *PrimeTime* report did not say what Tilton said it said—the report simply did not say that holy water in particular came from Taiwan nor that Tilton committed mail fraud. (905 F. Supp. at 1524, Pet. App. at A19) In any event, the district court carefully reviewed the record, including the hidden camera interview upon which the passage was based, and held that Tilton failed to show evidence that respondents made the statement with actual malice. (905 F. Supp. at 1524-25, Pet. App. at A19-A20)

After quoting the district court's ruling and its summary of his own argument, Tilton blithely contends "that the district court is going out of its way to accept the facts in a light most favorable to the moving party Defendants could not be more obvious." (Pet. at 11) Yet Tilton then cites to nothing in the record to suggest that respondents did act with actual malice. Instead, Tilton cites evidence he submitted to the district court intended to prove that he did not in fact obtain "holy water" from Taiwan. (Pet. at 12) But the district court did not dismiss Tilton's claim on the ground that the challenged statement was true—the court dismissed on the ground that Tilton made no showing that respondents acted with actual malice. Tilton's argument is thus irrelevant.

Tilton's final argument concerning the purported denial of his right to a jury trial amounts to the remarkable contention that a party can defeat a summary judgment motion merely by submitting sufficiently voluminous papers in opposition to the motion. Tilton explains that in the court below he submitted

2,243 pages and 174 exhibits intended to support his opposition to summary judgment. After erroneously asserting that *any* disputed fact identified by his submission should have precluded summary judgment,[3] Tilton concludes that "[c]onsidering the volume of factual information Pastor Tilton provided to both courts in support of his action, such a conclusion by the district court and the Tenth Circuit is not sustainable." (Pet. at 13)

Tilton attempted to overwhelm the courts below with a deluge of exhibits, a flurry of unsupported allegations and a barrage of irrelevant facts in the hope that sheer mass alone would persuade the courts that there must have been a genuine issue for trial. Yet Tilton was required, in response to the detailed and specific showing made by respondents, to come forward with "affirmative evidence" and "specific facts" to demonstrate that a reasonable jury could find (a) by clear and convincing evidence that respondents broadcast the statements challenged knowing that they were false or having serious doubts as to their truth and (b) that the challenged statements were false. *See Anderson*, 477 U.S. at 256-57. Despite the bulk of his papers, Tilton did not—indeed could not begin to—meet that burden. Summary judgment was properly granted by the district court and affirmed by the court of appeals.

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[3] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

II.

DISMISSAL OF TILTON'S CLAIM FOR AN INJUNCTION WAS PROPER UNDER OKLAHOMA LAW

A. Tilton's Claim for an Injunction Was Properly Dismissed as a Matter of Oklahoma Law, Not Because It Sought a Prior Restraint

Tilton's petition also challenges the district court's dismissal of his "equitable claim for permanent injunction." In an attempt to elevate his argument to a constitutional level worthy of this Court's attention, Tilton contends that the district court dismissed the claim on the ground that it sought a prior restraint, thereby implicating the First Amendment. (Pet. at 13)

Tilton attacks a straw man. The district court dismissed Tilton's claim for an injunction as a matter of Oklahoma state law, not on the ground that it sought a prior restraint barred by the First Amendment. (905 F. Supp. at 1518 n.3, Pet. App. at A5 n.3)[4] Under Oklahoma law, as held by the Oklahoma Supreme Court in *Schmoldt* v. *Oakley*, 390 P.2d 882 (Okla. 1964), equity will not enjoin a libel or slander, subject to certain limited exceptions. *See also House of Sight & Sound, Inc.* v. *Faulkner*, 912 P.2d 357, 361 (Okla. Ct. App. 1995); *First American Bank & Trust Co.* v. *Sawyer*, 865 P.2d 347, 352 (Okla. Ct. App. 1993).[5] The district court held that Tilton's claim did not fall within any of those exceptions and the claim was therefore dismissed under Oklahoma law.[6]

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[4] Tilton did not dispute that Oklahoma law governed.

[5] To the extent that the Oklahoma Supreme Court's holding under Oklahoma law was bolstered by constitutional concerns, such concerns were explicitly based on the Oklahoma state constitution, not the First Amendment. *Schmoldt*, 390 P.2d at 886; *see also House of Sight & Sound*, 912 P.2d at 362; *First American Bank & Trust*, 865 P.2d at 352.

[6] To be sure, had the district court enjoined future *PrimeTime* or other ABC news broadcasts, as Tilton sought, it would have acted in

B. Tilton Offers No Support for the "False Speech" Cause of Action He Asserts

Tilton contends that he should have been permitted to pursue a claim for injunctive relief against false speech, notwithstanding the dismissal of his underlying libel and false light claims based on his inability to satisfy his burden of proving actual malice and/or falsity. Not only is there no conflict in the circuits with regard to such a claim, but Tilton offers no authority whatsoever under Oklahoma law, or *any* other jurisdiction, upholding such a claim. Tilton's reliance on this Court's pronouncements in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942), that false statements of fact have slight or no constitutional value misses the point. As *Gertz* itself makes clear, this Court has squarely held that the Constitution requires, in an action brought by a public figure, that in the absence of actual malice false speech is constitutionally protected. *Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *see also New York Times* v. *Sullivan*, 376 U.S. at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . .") (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). Tilton's contention that "[o]bviously, the existence, or lack thereof, of actual malice is not an essential element in an attack upon libelous speech by its victims" (Pet. at 14) ignores his admitted public figure status and the decisions of this Court.

Tilton finally and inexplicably relies on the Third Circuit's decision in *Kramer* v. *Thompson*, 947 F.2d 666 (3d Cir. 1991),

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violation of the First Amendment. *See generally Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Near* v. *Minnesota*, 283 U.S. 697 (1931). But no such order was entered in this case.

a case that squarely refutes Tilton's argument. The plaintiff in *Kramer* was not permitted to pursue the "false speech" injunction claim Tilton asserts. Rather, the plaintiff asserted a libel claim, proved not only falsity but also actual malice, and prevailed on the merits of the claim. *Kramer*, 947 F.2d at 668, 679. Although the district court entered an injunction against future libels, the Third Circuit, applying Pennsylvania law, reversed that injunction. Consistent with Oklahoma law as found by the courts below here, the Third Circuit noted that "the maxim that equity will not enjoin a libel has enjoyed nearly two centuries of widespread acceptance at common law." 947 F.2d at 677. Contrary to Tilton's position, the Third Circuit opined that Pennsylvania law does *not* "permit an exception to the rule that equity will not enjoin a defamation in cases where there already has been a jury determination that the defendant's statements were libelous." 947 F.2d at 676.

Tilton's claim for an injunction was properly dismissed under Oklahoma law and is not deserving of this Court's review pursuant to its *certiorari* jurisdiction. *See* Supreme Court Rule 10.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Dated: December 23, 1996

Respectfully submitted,

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